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No. 04-1260

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF PORTLAND,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it ruled, consistent with all other circuits to address the issue, that 47 U.S.C. § 253(a) preempts state and local regulations that "may prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications service?

RULE 29.6 STATEMENT

Respondent Qwest Corporation was previously known as U.S. West Communications, Inc. The parent company of Qwest Corporation is Qwest Services Corporation. The parent company of Qwest Services Corporation is Qwest Communications International Inc. No publicly held company (other than Qwest Communications International Inc.) owns 10% or more of the stock of Qwest Corporation or Qwest Services Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

This case concerns the validity, under section 253 of the federal Telecommunications Act of 1996 (the "Telecom Act"), of several city ordinances that regulate telecommunications providers in Portland and other Oregon cities. The court of appeals remanded the case for "additional consideration" because the magistrate judge "failed to conduct an individualized preemption analysis of each city's ordinances," and misapplied established precedent. This petition followed.

The petition should be denied. First, this case is an exceptionally poor vehicle for review because the district court has not yet conducted a proper preemption analysis on remand. Second, there is no split of authority between the circuit courts warranting review. Finally, the City's procedural arguments are utterly without merit.

STATEMENT OF THE CASE

1. Qwest Corporation ("Qwest") is a nationwide provider of telecommunications services and is the incumbent local exchange carrier in 14 western states, including Oregon. To serve its customers, Qwest requires access to the public rights-of-way for the deployment of its facilities. Qwest through its predecessors has been providing telephone service in the City of Portland since 1932 under a License Agreement.

In 2000, Portland notified Qwest that it was revoking Qwest's long-standing license to use the City's public streets. Over the next several months, the parties discussed but were unable to agree on the terms of a new agreement. Qwest objected to the City's attempt to impose a wide range of unlawful regulatory obligations on Qwest. On June 25, 2001, the City threatened to deny all of Qwest's construction permit applications starting on July 2, 2001. In response, Qwest filed this lawsuit on June 29, 2001, seeking a declaration of its rights pursuant to section 253. The City and Qwest then agreed that the parties would enter into a Temporary Revocable Permit on the condition that Qwest's agreement was subject to a broad reservation of rights. Nine other cities intervened in the lawsuit.

2. The parties filed cross-motions for summary judgment. On the issue of the preemptive scope of section 253(a), the magistrate judge departed from established

precedent and held that the City can adopt any telecommunications regulations as long as those regulations do not literally prohibit Qwest from providing telephone service in Portland. *See Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1255-56 (D. Or. 2002).

3. Relying on the text of section 253(a) and widely established circuit court precedent, the Ninth Circuit reversed the magistrate judge holding that "[s]ection 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that 'may . . . have the effect of prohibiting the provision of such services.'" *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1239 (9th Cir. 2004) (quoting 47 U.S.C. § 253(a)); *see also City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001), *cert denied*, 534 U.S. 1079, 122 S.Ct. 809 (2002)).

The Court ruled that the magistrate judge failed to conduct an "individualized analysis of each Cities' challenged ordinances." *City of Portland* at 1240. The magistrate judge's general conclusions, it stated, were "not conducive to effective review on appeal." *Id.* Furthermore, the magistrate judge's "discussion of the *Auburn* factors was somewhat cursory, leaving us uninformed as to the rationale underlying the court's conclusion, other than its misguided attempt to avoid adhering to binding precedent." *Id.* at 1241. Lastly, the panel expressed concern that the magistrate judge failed to take into consideration the cumulative effect of the cities' regulatory schemes: "To determine whether preemption exists under § 253(a), it is necessary to analyze whether the regulatory scheme 'in combination' has 'the effect of prohibiting the provision of telecommunications services.'" *Id.* at 1240 (citation omitted). The Ninth Circuit

remanded the case for "additional consideration" consistent with its opinion. *Id.* at 1242.

4. At a recent status conference on remand, both parties requested and were granted additional time to conduct discovery before filing dispositive motions. (*See* Appendix A (Excerpts of Civil Minutes of Magistrate Judge Jelderks, Dkt. #300, D. Or. No. 3:01CV1005, Mar. 21, 2005).) Qwest was also given until May 5, 2005 to file its motion to amend its complaint.

REASONS FOR DENYING THE WRIT

The petition should be denied because: (1) The magistrate judge has yet to conduct a proper preemption analysis on remand in accordance with the Ninth Circuit's holding that section 253(a) preempts state and local regulations that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." (2) Every circuit court to rule on the issue has embraced the same standard applied by the Ninth Circuit in this case. (3) The City's jurisdictional arguments are without merit.

I. REVIEW BY THE SUPREME COURT IS PREMATURE

This case is not suitable for review. The Ninth Circuit found that the magistrate judge failed to conduct a proper preemption analysis and that his discussion of the applicable law "was somewhat cursory, leaving us uninformed as to the rationale underlying the court's conclusion." *City of Portland*, 385 F.3d at 1240-41. Thus the Court remanded the case with an order to conduct an "individualized analysis of each Cities' challenged

ordinances[,]" *id.* at 1240, and to take into consideration "the *Auburn* factors" in this analysis, *id.* at 1241.

When a matter has been remanded to the district court for such additional determinations, review by certiorari is premature. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 254-58 (1916) (denying writ because case was on remand to trial court with order to conduct accounting). This is especially true in cases such as this in which the matter has been remanded for further significant development of the factual and legal record. *See Adams v. Robertson*, 520 U.S. 83, 91-92 (1997) (it is of great value to Court to have "fully developed factual and legal record upon which to base decisions"). Furthermore, allowing this case to proceed through the district court might produce a result that makes it unnecessary to address the issue at hand. *Cf.* Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 231-32 (1983) (court should deny interlocutory writs when allowing case to proceed may obviate need for review). Judicial efficiency is better served by deferring review until all claims can be presented in a single petition, if in fact the magistrate judge ultimately concludes that the City of Portland's telecommunications ordinances do violate section 253.

II. THE PETITION PRESENTS NO SPLIT OF AUTHORITY WARRANTING CERTIORARI.

There is no split of authority on the issue presented warranting this Court's review. The City does not even argue that review is appropriate under Sup. Ct. R. 10.

1. The Ninth Circuit's ruling closely tracks the language of section 253(a). Thus it is not surprising that every circuit court to have considered the issue has reached the same conclusion as the Ninth Circuit. *See, e.g., TCG*

New York, Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002) (prohibition does not need to be complete or insurmountable to run afoul of section 253(a); any regulation that inhibits or limits ability of any provider to compete in fair and balanced legal and regulatory environment is preempted); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 & 1270 n.9 (10th Cir. 2004) ("[a] regulation need not erect an absolute barrier to entry in order to be found prohibitive," and "[s]ection 253(a) bars any legal requirement which may have the effect of prohibiting the ability of an entity to provide telecommunications service"); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1186 (11th Cir. 2001) (section 253 "prohibits state and local governments from passing laws or other regulations that 'may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service'").

2. The Federal Communications Commission (the "FCC") has held similarly: "We believe that [section 253] commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those . . . that have the practical effect of prohibiting an entity from providing service." *In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3,460 ¶ 22 (1997). As to the latter category, the FCC has stated that section 253 preempts all regulations that "materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.*; *see also In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396 ¶ 98 (1997) (same); *In re New England Pub. Communications Council Petition for Preemption Pursuant to Section 253*, 11 F.C.C.R. 19,713 ¶ 20 (1996) (substantial

increases in costs and other burdens unlawfully deters competition).

The City cites to *In re State of Minnesota, Petition for Declaratory Ruling*, 14 F.C.C.R. 21,697 (1999), and *In re California Payphone Ass'n Petition for Preemption*, 12 F.C.C.R. 14,191 (1997), for the proposition that the FCC has held that preemption under section 253(a) requires a detailed factual showing that the challenged requirements literally prohibit an entity from providing a specified service. (Petition at 18.) But this is exactly wrong. In fact, the FCC in *In re California Payphone Ass'n* held that "[t]his case, by sharp contrast, does not involve an express legal prohibition of service . . . . The more difficult issue is whether, under section 253(a), the Ordinance 'has the effect of prohibiting' the ability of any entity to provide payphone service . . . ." 12 F.C.C.R. 14,191. ¶¶ 30-31. The FCC has even stated that section 253 preempts requirements that restrict a provider's options on how to deploy its services: "section 253(a)[] bars state and local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options." *In re State of Minnesota*, 14 F.C.C.R. 21,697 ¶ 40.

3. These appellate and FCC decisions are not in conflict with this Court's decisions. *See Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 491 (2002) (section 253(a) "prohibits state and local regulation that impedes the provision of 'telecommunications service'"); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) ("States [and local governments] may no longer enforce laws that impede competition . . . ."). And the reason for this is

plain: under the Telecom Act, "the Federal Government has taken the regulation of local telecommunications competition away from the States [and local governments]." *Id.* at 378 n.6.

In *Nixon v. Missouri Municipal League*, this Court dealt with the issue of whether state political subdivisions that provide their own telecommunications services may benefit from the preemptive force of section 253. 541 U.S. 125 (2004). The Court concluded that cities and other state subdivisions are not of the class of entities contemplated for protection by section 253. *Id.* at 138. This Court in *Nixon* never suggests that section 253 requires a literal prohibition. To the contrary, the Court stated that it is "possible that a law prohibiting the ability to provide telecommunications means a law that limits or cuts back on some preexisting authority . . . to go into the telecommunications business." *Id.* at 134-35. By adding "the words 'or ha[s] the effect of prohibiting,'" to section 253(a), "Congress signaled its willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces." *Id.* at 139.

III. THE CITY'S PROCEDURAL ARGUMENTS MISINTERPRET THE BROAD PREEMPTIVE SCOPE OF SECTION 253.

The City's procedural arguments are unintelligible.

Qwest sought declaratory relief under the Supremacy Clause because the City's telecommunications regulations violated section 253(a). There was, and is, no question that Qwest had standing to bring this claim. The City fails to cite

a single section 253 case to support its baffling suggestion to the contrary.[1]

Furthermore, section 253 cases are routinely decided on summary judgment. *See, e.g., City of Portland*, 385 F.3d 1236; *City of Santa Fe*, 380 F.3d 1258; *City of Rome v. Verizon Communications Inc.*, 362 F.3d 168 (2d Cir. 2004); *New Jersey Payphone Ass'n, Inc. v. Town of W. New York*, 299 F.3d 235 (3d Cir. 2002). The City itself moved for summary judgment in this case, and so must also believe that Rule 56 is a proper mechanism for deciding federal preemption issues under section 253.

Contrary to the City's assertions otherwise (*see* Petition at 7-8 & 18), Qwest presented multiple facts in support of its summary judgment motion, all establishing that the City is unlawfully regulating beyond its proscribed role in regulating right-of-way management in violation of section 253.[2] As the Ninth Circuit stated, the magistrate judge failed to conduct a proper preemption analysis, and remanded the case for such determination. The magistrate judge has already granted the parties time to conduct additional discovery before filing revised Rule 56 motions. So additional factual information will be presented on remand. Until the magistrate judge again rules on the parties' motions, the record contains no articulation of any reasoned decision regarding the application of section 253.

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[1] In support of its standing argument, the City states that Qwest concedes that any effect of the challenged regulations and requirements is entirely speculative. (Petition at 7 & 16.) Qwest does not concede such. To the contrary, Qwest brought its declaratory judgment claim because the City's telecommunications regulations in fact violate section 253(a).

[2] (*See, e.g.*, Qwest's Addendum and Excerpts of Record Filed in Support of Qwest's Opening Brief.)

CONCLUSION

Because there is no circuit split on the issue presented and the record is incomplete, the petition for writ of certiorari should be denied.

Respectfully submitted,

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